United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

January
~~OCTOBER~~ TERM, 192~~3~~4.

No. 3977. 2

ALPHER, KUR, GREENBERG COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

HENRY HOLOBER.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 5, 1923.

PRINTED JULY 24, 1923.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1923.

No. 3977.

ALPHER, KUR, GREENBERG COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

HENRY HOLOBER, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1923.

Court of Appeals of the District of Columbia.

No. 3977.

ALPHER, KUR, GREENBERG CO., a Corporation, Plaintiff in Error,
vs.
HENRY HOLOBER.

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1 Municipal Court of the District of Columbia.

At Law.

Number A-610.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,
vs.
HENRY HOLOBER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

2 *Declaration.*

Filed April 28, 1922.

In the Municipal Court of the District of Columbia.

No. A-610.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,
vs.
HENRY HOLOBER, Defendant.

1. The plaintiff, Alpher, Kur, Greenberg Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, sues the defendant, Henry Holober, for that heretofore,

to wit, on the 25th day of November, 1921, one I. Holober, by his promissory note, now over due, promised to pay to the order of the plaintiff two hundred and ten dollars, ($210.00), four months after date, with interest, and the defendant, who was then and there trading as United Upholstery Company, before delivery thereof, endorsed said note by signing upon the back thereof,

"United Upholstery Company.
Henry Holober,"

and said note was thereafter, for value, delivered to the plaintiff, which is now the holder and owner thereof; said note was duly presented for payment and was dishonored and protested for non-payment at a cost of two dollars and 11/100, ($2.11), whereof said defendant had notice, but the said defendant did not, nor did the maker of said note, pay any portion of the principal or interest of said note, or said cost of protest.

3 Wherefore, the plaintiff brings this suit, and claims of the said defendant the sum of two hundred twelve and 11/100 dollars, ($212.11), with interest on two hundred and ten dollars, ($210.00), thereof from the 25th day of November, 1921, besides costs.

2. And the said plaintiff further sues the said defendant for that, heretofore, to wit, on the 27th day of December, 1921, one I. Holober, by his promissory note, now overdue, promised to pay to the order of the plaintiff two hundred and fifty dollars ninety days after date, with interest, and the defendant, who was then and there trading as United Upholstery Company, before delivery thereof, endorsed said note by signing upon the back thereof

"United Upholstery Company.
Henry Holober,"

and said note was thereafter, for value, delivered to the plaintiff, which is now the holder and owner thereof; said note was duly presented for payment and was dishonored and protested for non-payment at a cost of two dollars and 11/100, ($2.11), whereof said defendant had notice, but the said defendant did not, nor did the maker of said note, pay any portion of the principal or interest of said note, or said cost of protest.

Wherefore, the plaintiff brings this suit, and claims of the said defendant the further sum of two hundred fifty-two and 11/100 dollars, ($252.11), with interest on two hundred and fifty dollars, ($250.00), thereof from the 27th day of December, 1921, besides costs.

3. And the said plaintiff further sues the said defendant for that heretofore, to wit, on the 25th day of January, 1922, one I. Holober, by his promissory note, now overdue, promised to pay to the order of the plaintiff three hundred fifty-five and 58/100 dollars,
4 ($355.58), sixty days after date, with interest at six per centum per annum, and the defendant, who was then and there trading as United Upholstery Company, before delivery thereof, endorsed said note by signing upon the back thereof,

"United Upholstery Company.
Henry Holober."

and said note was thereafter, for value, delivered to the plaintiff, which is now the holder and owner thereof; said note was duly presented for payment and was dishonored and protested for non-payment at a cost of two dollars and 11/100, ($2.11), whereof said defendant had notice, but the said defendant did not, nor did the maker of said note, pay any portion of the principal or interest of said note, or said cost of protest.

Wherefore, the plaintiff brings this suit, and claims of the said defendant the further sum of three hundred fifty-five and 69/100 dollars, ($355.69), with interest on three hundred fifty-five and 58/100 dollars, ($355.58), thereof from the 25th day of January, 1922, besides costs.

4. And the said plaintiff further sues the said defendant for goods sold and delivered by the plaintiff to the defendant; and for work done and material provided by the plaintiff for the defendant at his request; and for money loaned by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims of the said defendant the further sum of eight hundred twenty-one and 91/100 dollars, ($821.91), with interest on two hundred and ten dollars, ($210.00), thereof from November 25, 1921, with interest on two hundred fifty dollars, ($250.00), thereof from December 27, 1921, and with interest on three hundred fifty-five and 58/100 dollars, ($355.58), thereof from January 25,
5 1922, according to the particulars of demand hereto annexed, besides costs.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

6 *Bill of Particulars.*

Filed April 28, 1922.

* * * * * * *

$210.00. Washington, D. C., Nov. 25, 1921.

Four Months after date I promise to pay to the order of Alpher, Kur, Greenberg Co., Two Hundred, Ten & 00/100 Dollars, at 911 9th St., N. W., Value received, with interest at 6 per cent per annum until paid.

Due 25 Mch., 1922.

(Signed) I. HOLOBER.

Endorsement: United Upholstery Co., Henry Holober.
Revenue stamps: 6¢.

$250.00. December 27, 1921.

Ninety days after date I promise to pay to the order of Alpher, Kur & Greenberg, Two hundred and fifty 00/100 Dollars, at 911 9th St., N. W., with interest.

Value received.
(Signed) I. HOLOBER.

Due 27 Mar., 1922.

Endorsement: United Upholstery Co., Henry Holober.

Revenue stamps: 6¢.

7 Washington, D. C., January 25, 1922. $355.58.

Sixty days after date I promise to pay to the order of Alpher, Kur & Greenberg Three Hundred Fifty-Five & 58/100 Dollars, for value received, with interest from date, at rate of 6% per annum, until paid.

Payable at 1918 14th St., N. W., Wash., D. C.
(Signed) I. HOLOBER,
Address: 1918 14th St. N. W.

Due 26 Mar., 1922.

Endorsement: United Upholstery Co., Henry Holober.

Revenue stamps: 8¢.

SIMON, KOENISSBERGER & YOUNG,
Attorneys for Plaintiff.

8 *Affidavit of Defense*

Filed September 5, 1922

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Leave of court having been first had and obtained to make and file this amended affidavit of defense, Henry Holober, being first duly sworn, deposes and says, that he is the defendant in the above entitled cause; that he has a good defense to the whole of the cause of action sued on hereon, which defense is as follows, to wit:

He admits the execution of the note in paragraph one of the declaration mentioned, and admits that the same has not been paid in full according to its tenor and effect, but denies that there is now due upon the said note its face value with interest, and demands a strict account.

And as a further defense the defendant says that the notes in the plaintiff's declaration mentioned were executed by the defendant and one I. Holober as a part of the purchase price for a certain stock of jewelry sold and delivered by the plaintiff to the said I. Holober on or about the 15th day of September, 1921;

That this defendant and the said I. Holober agreed to pay to the plaintiff for the said stock of jewelry the sum of two thousand seven hundred and seventy-seven dollars and ninety-six cents ($2,777.96), and on the date last aforesaid the said I. Holober did pay to the plaintiff the sum of one thousand dollars ($1,000), in cash, and this defendant and the said I. Holober executed and delivered to the plaintiff certain promissory notes, including the one herein sued on, of an
aggregate face value of one thousand, seven hundred and
9 seventy-seven dollars and ninety-six cents ($1,777.96), and
there has been paid to the plaintiff on account of the said notes at various time the sum of five hundred and thirty-one dollars ($531.00).

And this defendant says that he and the said I. Holober were defrauded by the plaintiff in the sale and delivery of the said stock of jewelry in that the said I. Holober at the time of the said purchase and sale was intending to establish himself in the retail jewelry business in the City of Washington; that he was without experience in the conduct of such a business or in the purchasing of stocks of jewelry, all of which was well known to the plaintiff;

That the plaintiff, having learned of the intention of the said I. Holober as aforesaid, through its officers and agents represented to the said I. Holober and to this defendant that it, the plaintiff, was a wholesale jewelry establishment of excellent standing and long experience, thoroughly competent to select a stock of jewelry for an inexperienced person desiring to engage in the retail jewelry business; and that if the said I. Holober and this defendant would leave to the plaintiff the selection of a stock of jewelry and the fixing of the wholesale prices on the various articles constituting said stock to be paid to the plaintiff therefor, that it, the plaintiff, would select the same and sell it to the said I. Holober on terms of part cash and part notes of the said I. Holober and this defendant; and that owing to the inexperience of the said I. Holober and the experience and standing of the plaintiff, it would be to the financial advantage of the said I. Holober to rely wholey upon the good faith and experience of the plaintiff in making the selection of the various articles constituting said stock of jewelry and the fixing of the prices to be paid therefor;

10 That the plaintiff falsely and fraudulently made the said representations to this defendant and the said I. Holober for the purpose of inducing them to rely upon the said false and fraudulent statements and representations and for the purpose of defrauding the said I. Holober and this defendant; and that plaintiff knew the said representations and statements were false at the time the same were made;

That the said I. Holober and this defendant believed the said false and fraudulent representations of the said plaintiff made for the fraudulent purposes aforesaid, and in reliance thereon agreed to leave to the plaintiff the selection of the said stock of jewelry and the fixing of the prices to be paid for the various articles constituting the same;

That the plaintiff, with the knowledge of the premises herein above set forth, also falsely and fraudulently represented to this defendant and the said I. Holober that the various articles constituting the said stock of jewelry would be of the qualities respectively represented by the plaintiff;

That this defendant and the said I. Holober believed the said last named false and fraudulent representation of the plaintiff and relied thereon;

That the plaintiff knew that the said representations were false and fraudulent at the time of the making of the same, and made them for the express purpose of defrauding this defendant and the said I. Holober.

That by means of the said false and fraudulent representations of the plaintiff, made as aforesaid, and relied upon by this defendant and the said I. Holober, the plaintiff fraudulently selected certain articles composing the said stock of jewelry which it, the plaintiff, represented to be solid gold of certain karat and fineness, when in truth some of the said articles were brass, thinly gold plated,
11 and others of the said articles were of a very much lower karat or fineness than that falsely stated by the plaintiff. That the amount of which this defendant and the said I. Holober were defrauded by means of the above last named misrepresentations of the plaintiff was, to wit: approximately the sum of five hundred dollars, ($500), and that the said I. Holober now has in his possession articles misrepresented as hereinabove just stated for which a charge was made of the sum of one hundred and eighty-five dollars, ($185), but which because of their lower quality of gold or because they are brass are worth not to exceed the sum of fifty dollars, ($50).

That the plaintiff, having secured the confidence of this defendant and the said I. Holober in the false and fraudulent manner hereinabove set forth, and knowing that this defendant and the said I. Holober were implicitly relying upon the good faith of the plaintiff and were believing that the false and fraudulent statements of the plaintiff as hereinabove set forth were true, with the intention of defrauding this defendant and the said I. Holober, fixed the prices of all of the articles composing the said stock of jewelry fraudulently selected by the plaintiff as hereinabove set forth at from two hundred to three hundred and fifty per cent over and above the usual wholesale price of identical or like articles regularly for sale in the wholesale jewelry market at the time of the transaction herein set forth. That the said I. Holober now has in his possession various articles remaining from the said stock of jewelry, for which this defendant and the said I. Holober were fraudulently charged the sum of approximately twelve hundred dollars, ($1,200), and that the true market value for the same was not above the sum of three hundred and fifty dollars, ($350), in addition to which the said I. Holober was compelled to sell many of the articles composing the said 12 stock at a loss of from 150 to 200 per cent from the price charged to him by the said plaintiff.

That the plaintiff falsely and fraudulently fixed the said prices at said advance of from two hundred to three hundred and fifty per cent over and above the wholesale market value with the intent to defraud this defendant and the said I. Holober, with knowledge that this defendant and the said I. Holober were inexperienced in the jewelry business; and that the said plaintiff was enabled to fix the said prices at said exorbitant figures by reason of the false and fraudulent statements made by the plaintiff to this defendant and the said I. Holober for the purpose of defrauding them, which said statements were known by the plaintiff at the time of making the same to be false and fraudulent, and which said statements were believed to be true and were relied upon by this defendant and the said I. Holober.

That upon the discovery of the fraud perpetrated upon this defendant and the said I. Holober, as hereinabove set forth, the said I. Holober and this defendant, demanded of the plaintiff that the sale and delivery of said stock of goods be cancelled; that the plaintiff refused to accept a return of the said stock of goods and refused to pay to the said I. Holober or to this defendant any part of the purchase price paid for the same or to cancel any of the notes given as part of the said purchase price, which said notes are those now sued upon herein. That at various times after the said sale until the institution of this suit the said I. Holober returned to the plaintiff various articles from said stock of jewelry, amounting in all to the sum of three hundred dollars ($300), for which the said plaintiff promised to credit this defendant and the said I. Holober upon the said purchase money notes now sued upon herein, but the plaintiff has failed to credit this defendant or the said I. Holober with any part thereof.

13 That of the articles constituting said stock of jewelry, for the purchase price of which the plaintiff is now suing herein, articles to the value of one hundred and twelve dollars, ($112), charged against this defendant and the said I. Holober, were never delivered by the plaintiff to the said I. Holober, notwithstanding which the plaintiff has included the purchase amounting to one hundred and twelve dollars, ($112), in the amount now sued for herein.

That by reason of the premises hereinabove stated, the value of the various articles constituting the said stock of jewelry and the quality thereof were peculiarly within the knowledge or the means of knowledge of the plaintiff; and the false and fraudulent representations of the plaintiff made with respect to such value and quality were, from the nature and subject matter of the transaction, expected and intended by the plaintiff to be relied on by this defendant and the said I. Holober.

That by reason of the fraud of the plaintiff upon this defendant and the said I. Holober as hereinabove set forth, the said I. Holober was unable to dispose of the said stock of jewelry at retail at any profit but was, on the other hand, compelled to sacrifice the same at losses of from 150 to 200 per cent, whereby the said I. Holober became a bankrupt and his estate has been adjudicated in bankruptcy.

That by reason of all the matters and things above set forth, this defendant and I. Holober were falsely and fraudulently induced by the plaintiff to agree to pay for the said stock of jewelry the said sum of two thousand seven hundred and seventy-seven dollars and ninety-six cents, ($2,777.96), whereas in truth and in fact the full reasonable wholesale market value for the said stock of jewelry was not in excess of the sum of one thousand dollars, ($1,000.00), all of which and more has already been paid by the plaintiff for said stock.

HENRY HOLOBER.

14 Sworn to before me this 5th day of September, 1922.

H. M. HULL,
Ass't Clerk.

And as a further defense to the plaintiff's said cause of action, the defendant, by W. Bissell Thomas, his attorney, defends the wrong and injury when, etc., and says he did not promise and undertake in manner and form as the plaintiff in his declaration hath alleged, and of this the defendant puts himself upon the country.

W. BISSELL THOMAS,
Defendant's Attorney.

15 *Stipulation.*

Filed May 11, 1922.

No. A-610.

ALPHER, KUR, GREENBERG Co., Plaintiff,

vs.

HENRY HOLOBER, Defendant,

and

No. 79164.

ALPHER, KUR, GREENBERG Co., Plaintiff,

vs.

HENRY HOLOBER, Defendant,

The plaintiff, by Simon, Koenigsberger & Young, its attorneys, and the defendant by Wilton Lamber and W. Bissell Thomas, his attorneys, hereby stipulate and agree that the parties in the foregoing cases are identical, and that the same be consolidated for trial, without prejudice to the jurisdiction of the court; and that notwithstanding said consolidation for trial separate judgments be entered in each of said causes.

Done at Washington, D. C., this 11th day of May, 1922.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.
WILTON LAMBERT AND
W. BISSELL THOMAS,
Attorneys for Defendant.

16 *Verdict.*

September 27, 1922.

At Law.

No. A-610.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

At Law.

No. 79164.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

September 26, 1922.

Come now the parties in each of the foregoing entitled causes by their respective attorneys of record, and it is agreed that these causes be consolidated for the purposes of trial. Thereupon, come a jury of good and lawful men of this District, to wit:

William H. Jett, Samuel P. Agnew, Preston B. Adams, Julien P. Ballenger, Samuel S. Dalton, H. Philips Pearl, Waldo A. Bacon, John E. Baker, Eugene Decker, John O. Nash, William G. Thomas, and Martin F. Abbott,

who are duly sworn to well and truly try the matters of difference herein between the plaintiff and defendant, and after said causes being heard in part the jury is respited until September 27, 1922, at 10 o'clock, A. M.

* * * * * * *

September 27, 1922.

Come again the parties in the above entitled causes and the same jury that was respited on Tuesday, September 26, 1922, except John E. Baker, who by agreement of the parties in each 17 of the foregoing entitled causes, by their respective attorneys of record, is excused from sitting further in these causes, and after these causes are given to the said eleven jurors in charge, they upon their oath say that in cause, No. A-610, they find in favor of the defendant, and in cause, No. 79164, they also find for the defendant. Whereupon, on motion of the attorney for the plaintiff that the jury be polled, each of the said eleven jurors upon individual inquiry as to his verdict in each of said causes, answers: For the defendant.

Judgment.

November 27, 1922.

* * * * * * *

Upon consideration of plaintiff's motion for a new trial filed herein, it is ordered that said motion be and the same is hereby denied, and judgment on the verdict in this cause entered. Wherefore, it is considered that the plaintiff take nothing by this action, defendant go hence without day, be for nothing held and recover his costs of defense.

18 *Prayers.*

Filed September 27, 1923.

Numbers A-610 and 79164.

ALPHER, KUR, GREENBERG CO., Plaintiff,

vs.

HENRY HOLOBER, Defendant.

Plaintiff's Prayer for Instructions No. I.

(Modifications Underlined.)

The Jury are instructed that their verdict should be for the plaintiff for the amount sued for, less the price of goods charged for and not delivered, if any, and less also the price of such goods, if any, as were returned by I. Holober to the plaintiff and agreed by the plaintiff to be credited on the notes in suit, *provided the jury believe from the evidence that no fraud was perpetrated by the plaintiff in the transaction.*

Defendant's objection overruled.

Plaintiff's objection to modification overruled.

Plaintiff's Prayer for Instructions No. 2.

You are instructed that even if you believe from the evidence that the prices charged by the plaintiff for the merchandise sold to the defendant were higher than those at which I. Holober might have purchased like goods from other concerns, that is not a defense [in whole or in part],* *unless other elements are present which amount to fraud.*

Plaintiff's objection to modification overruled.

19 Plaintiff's Prayer for Instructions No. 3.

Fraud is not available to the defendant unless you find by the preponderance of the evidence; First, that the plaintiff made misrepresentations of material facts to the defendant; second, that such misrepresentations were known by the plaintiff to be misrepresentations, and with intent to defraud; third, that such representations were believed by the defendant; fourth, that the defendant has thereby suffered injury.

Allowed.

Plaintiff's Prayer for Instructions No. 4.

Fraud is not available as a defense to the defendant unless you find by the preponderance of the evidence that fraudulent misrepresentations were made by the plaintiff to the defendant, [or by the plaintiff to some other person with the intention of having them communicated to the defendant.]*

Allowed.

Plaintiff's Prayer for Instructions No. 5.

The jury are instructed that the burden is upon the defendant to prove by the preponderance of the evidence the facts upon which he relies as his defense.

Allowed.

20 *Memorandum of Court re Motion for New Trial.*

Filed November 27, 1922.

Numbers A-610 and 79164.

ALPHER, KUR, GREENBERG CO., Plaintiff,
vs.
HENRY HOLOBER, Defendant.

Upon hearing the argument in support of the motion and after examining the minutes of the trial, including the judge's charge to

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[*Words enclosed in brackets erased in copy.]

the jury, from which it appears that the facts in issue, including the representations made prior to the endorsement of the notes; the prices paid for the goods and the prices as given by the experts produced by both parties were fairly and squarely presented to the jury for determination upon all the evidence, therefore,

We deny the motion for a new trial.

MARY O'TOOLE,
Judge.

November 27, 1922.

21 *Memoranda.*

January 4, 1923.—Time within which to submit the bill of exceptions extended until January 31, 1923.

January 30, 1923.—Time within which to submit the bill of exceptions further extended until February 10, 1923.

February 8, 1923.—Bill of exceptions submitted, signed and ordered of record nunc pro tunc.

February 28, 1923.—Time within which to file transcript of record extended to and including April 1, 1923.

March 31, 1923.—Time within which to file transcript of record extended to and including April 5, 1923.

22 *Assignment of Errors.*

Filed April 2, 1923.

* * * * * * *

1. The Court erred in admitting evidence of alleged overcharge of I. Holober of the plaintiff, as set out in the bill of exceptions.
2. The Court erred in modifying the plaintiff's first prayer for instructions to the jury, as set out in the bill of exceptions.

The Court errer in modifying the plaintiff's second prayer for instructions to the jury, as set out in the bill of exceptions.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

23 *Designation of Record.*

Filed April 2, 1923.

* * * * * * *

The Clerk of the Court will kindly prepare transcript of record on appeal in the above entitled cause, and will include therein the following:

1. Declaration.
2. Bill of Particulars.
3. Affidavit of defense.
4. Stipulation.
5. Verdict and judgment.

6. Plaintiff's prayers for instructions to the jury.
7. Memorandum of Court denying motion for new trial.
8. Memoranda as to extensions of time for submitting bill of exceptions and for filing transcript of record on appeal.
9. Assignment of errors.
10. This designation.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

24 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause, At Law, Number A-610, wherein Alpher, Kur, Greenberg Company, a Corporation, is plaintiff, and Henry Holober is defendant, as the same *that* remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of April, 1923.

[Seal of the Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk,
By H. M. HULL,
Asst. Clerk.

25 Filed Dec. 18, 1922. Municipal Court, District of Columbia.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Mary O'Toole, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Alpher, Kur, Greenberg Company, a corporation, plaintiff, and Henry Holober, defendant, No. A-610, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, with 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 16th day of December, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by
CHAS. H. ROBB,
Associate Justice of the Court of
Appeals of the District of Columbia.

[Endorsed:] Filed Dec. 18, 1922. Municipal Court, District of Columbia.

26 Filed Feb. 8, 1923. Municipal Court, District of Columbia.

In the Court of Appeals of the District of Columbia.

No. A-610.

ALPHER, KUR, GREENBERG COMPANY, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

No. 79164.

ALPHER, KUR, GREENBERG COMPANY, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

Be it remembered that the above-entitled causes came on for trial on the 26th day of September, 1922, before Miss Justice O'Toole and a jury.

Lawrence Koenigsberger, Esq., of Simon, Koenigsberger & Young, appeared for the plaintiff, and W. Bissell Thomas, Esq., appeared for the defendant.

And thereupon, to maintain the issues on its part joined, the plaintiff called as a witness HENRY HOLOBER, the defendant, who, on direct examination, stated that he was the defendant, and identified his signature on the back of the following-named promissory notes, payable to the order of Alpher, Kur, Greenberg Company:

Note dated September 10, 1921, for $355.58, payable February 25, 1922.

Note dated November 25, 1921, for $210, payable four months after date.

Note dated December 27, 1921, for $250, payable ninety days after date.

Note dated January 25, 1922, for $355.58, payable sixty days after date.

The witness further stated that the United Upholstery Company was the concern that he was interested in, and that at the time nobody else was interested in that concern. The notes were thereupon offered and received in evidence.

27 And thereupon further to maintain the issues on its part joined, the plaintiff called as a witness HERMAN KUR, who, on direct examination, testified in substance as follows:

I am secretary and treasurer of the Alpher, Kur, Greenberg Company, and was so at the time the notes were given; they have not been paid.

On cross-examination the witness testified in substance as follows:

I am the manager of the Alpher, Kur, Greenberg Company. The notes were given for jewelry, silverware, jewelry boxes, clocks and a lot of merchandise which I cannot name individually.

And thereupon the plaintiff rested.

And thereupon, to maintain the issues on his part joined, the defendant called as a witness ISIDORE HOLOBER, who, on direct examination testified in substance as follows:

My business is that of a watch repairer, and I have been a watch repairer practically all of my life. I first had experience with the jewelry business as a jewelry merchant last year the beginning of September. I took a store up on 9th Street, and while I was fixing up the store a Mr. Gregory suggested that I buy merchandise from the plaintiff, and I went to their store and Mr. Gregory introduced me to Mr. Kur and to Mr. Stein.

So that same day—the same time when I was there he showed me some of the merchandise and told me, "This is the merchandise you will need over there," and so they took over some of the merchandise that day.

That was late in the afternoon and it was just about closing time, so he told me to come back the next day, and when I came back the next day he had all the goods packed up, and he says, "I have got just a nice stock for you."

28 Mr. Kur told me about $1,500 worth of stock would fix me up all nice. I told him I had only $1,000. The next day Mr. Kur told me he had everything fixed up all ready for shipment, but he said instead of it amounting to $1,500, he had fixed up a stock that would amount to $2,900 worth of merchandise. I had not that much money, so my brother-in-law endorsed the notes.

That was the day after I first had gone down to Kur's store. The stock was delivered to me at 911 9th Street, a few hours after I got down there; that was the store I was fitting up. I checked up the merchandise and I found about $112 worth of merchandise missing, and I called it to the attention of Mr. Kur, so Mr. Kur said that they will come up and check up the goods with me. One time he came up, that was the time I asked him to check the merchandise, so he also said he would come back the next day, but he never came back.

Q. After you had got the stock unpacked and displayed in the store did you make a discovery concerning the prices that you had paid, as compared with the ordinary reasonable wholesale prices of like articles? A. Well, I displayed the merchandise in the window and also in the showcases, and thought I was ready to do business, and I was surprised that people would walk in to buy something and——

At this point counsel for the plaintiff objected upon the ground that the defense at that point seemed to be that the witness was overcharged, and that even if that were right, it would not constitute a defense. But the Court overruled the objection, to which action of the Court the plaintiff by its counsel then and there noted an exception.

The witness thereupon resumed his testimony as follows:

Customers use to come in to buy something, merchandise they wanted, and many of them would tell me, "Why, I could get this here for half the price."

After I opened up the stock I found out what the value was, I told Mr. Kur I am overcharged between a hundred and three hundred and fifty per cent.

The first instance I found that articles that had been sold to me for gold were brass was when a customer, Miss May H. O'Conner, had been in and bought a chain supposed to be solid gold, which had been sold to me for solid gold, and charged the price of solid gold.

At this point the plaintiff, by its counsel, objected, upon the ground that the witness having testified that the merchandise sold to him by the plaintiff was delivered boxed, he could not identify the 29 chain as having been sold to him by the plaintiff. But the Court overruled the objection, to which action of the Court, the plaintiff, by its counsel, then and there duly excepted.

The witness thereupon identified the chain as one of the articles that he got from Mr. Kur, which was put up and made part of the $2,900 that he testified to, for which the notes were given in part payment. The witness thereupon identified the original bills, dated September 9 and 10, 1921, that he got for the merchandise from

Alpher, Kur, Greenberg Company, for which the notes were given, and they were offered in evidence. The bills contained 512 items charged at a total cost of $2,591.94. Of these items 456 were for single pieces amounting to $2,2249.35, 12 were for two pieces each amounting to $106.02, 16 were for three pieces each amounting to $46.38, 17 were for six pieces each amounting to $80.87, one was for ten pieces amounting to $21.38, 8 were for twelve pieces each amounting to $79.69, 1 was 18 pieces amounting to $6.75, and 1 was for 24 pieces amounting to $1.50.

Mr. Koenigsberger: There are a number of check marks here, there are some notations. What are they?

Mr. Thomas: I will state that we do not intend to use any of those check marks anyway.

Mr. Koenigsberger: Shorthand notes. The printed and typewritten parts of these are offered

Mr. Thomas: That is all. Any check marks there, or anything of that kind are not intended to be used.

The witness thereupon identified 27 of the articles appearing on said bills, which amounted to $154.42. taking into consideration the fact that of some of the articles more than one was sold.

The items which I have identified are part of the stock that was sold to me for which these notes were given; I did not have an apportunity to examine these things before they were sent to me; they were selected by Mr. Kur; he showed me some of the merchandise that afternoon; I could not tell you how much; I figure altogether there must be $1,000 or $1,200 worth, at the price he sold it to me, of the merchandise left; I knew the value of these goods two months after they had been delivered to me.

On cross-examination the witness testified in substance as follows:

30 These goods were purchased in September, 1921; all of it was represented by notes and cash; I think five notes were given altogether at that time; some of them were curtailed; they were all given on or about September 10th; of the four notes being sued on only one is the original, and the other three are renewals or curtails. I found I had been cheated about two months after I bought the merchandise, in about November, 1921; I gave a note on January 20, 1922 because he threatened to collect the notes and close me up, and that was the only thing I could make a living for my family; I went into bankruptcy, but I was not adjudicated a bankrupt; I made a settlement and paid 20% on the Dollar; I was represented by Mr. Rudolph B. Behrend at the time; he is a member of the Bar.

The witness thereupon identified schedule B-3 of his petition in voluntary bankruptcy, filed in the Supreme Court of the District of Columbia on March 2, 1922, which contained the following entry: "Name of creditors, 1, Alpher, Kur, Greenberg Co.; residence 417 Seventh Street; when and where contracted, Washington, D. C.,"

$1,750; I signed that paper with that statement on it; I did not suggest to the referee that this should not be paid; Henry Holober signed the note before the stock was delivered;

On redirect examination the witness testified in substance as follows:

I returned some of the goods to the plaintiff on an agreement with it. I took back about $300 worth, and he gave me credit; it was not credited on the notes: the amount now attempted to be recovered includes the $300 that I returned; Mr. Behrend, my attorney, prepared my schedule in bankruptcy; I did not have Mr. Behrend employed in the controversy between me and Alpher, Kur, Greenberg Company; I told him some of the details about that; he said "There is nothing else to do, you have got to put in a claim"; the first time I was advised that the transaction would be such that I would have a legal defense to it was when they sued us and my brother-in-law got the summons, and he was sued for the notes.

On recross-examination the witness testified in substance as follows:

I went to school; I did not know that a man can not close you up by bringing suit against you; I bought other stuff on open account,
amounting to about $600; the merchandise that I returned,
31 worth about $300 was not credited against the open account.
They used to send me a statement; I swore to the schedule in bankruptcy.

On further cross-examination the witness testified in substance as follows:

I could not tell you exactly about all of the merchandise that was short, because I thought he was satisfied that he didn't come up and check up the goods; I made a check but I have not it here with me; I might find it; I can't remember what it was that was short; I checked it against the invoice; the crosses on the invoices indicate what stuff I did not receive; I did not check all of the merchandise that I did not receive; the stuff that is indicated by cross marks and the stuff that has no check against it was not delivered to me. I thought it was sufficient to come in here and say that there was $112 short; I never sent Alpher, Kur, Greenberg Company an itemized list; I just said there was $112 short; I have not a list of the $300 worth of goods that I returned, but the credit bill from them; they gave me a credit memorandum; after I bought this stuff I bought about $600 worth of stuff; some of this stuff was returned for credit against that there $600 worth; I went to Mr. Stein at the time I bought that $600 worth, and traded in some of the old stuff for new stuff; I have not paid for that $600 worth of stuff; the credit memoranda were not an excess over $600; the credit memorandum could not have been charged against open account which would have still left a balance due on the open account, and left the amount due on this note as it is now, because Mr. Stein would take back the merchandise that my Brother-in-law signed for; Mr. Stein was a partner in the business there; there was no writing to indicate that this merchandise was to be credited against these notes; this merchandise amounted to something about $300.

Q. About $300. Why, if that merchandise was to be credited against these notes, didn't you get one of the notes back? There was a note for $210 and one for $250. If it was paid by returning the merchandise why didn't you get that note back? A. That was returned before I had that note for $210. There is the date on the bill.

I returned this merchandise for credit against the notes about six or seven weeks after I gave the notes—about the middle of October;
it was before December 20, and on December 20 I made a cur-
32 tail of $75 on account of a note for $355. I paid cash for
that when I was entitled to have a credit against this note, and to have it discharged, because Mr. Kur kept on threatening me all the time, so I kept the notes and collected it. I was not aware of the fact that I was entitled to a credit on these notes, because I did not see it that way; it may be that I gave a new note for $150 on October 25, and paid a curtail of $205 after I returned the merchandise for credit on those notes; I don't know; it is a fact that a note dated September 10th came due on October 25th, and that on that day I paid $205.64, and gave a new note for $150, and when that note came due on December 20, I paid $75 more; the bank paid it and charged it against my account. I paid $255 in cash, notwithstanding the fact that I was entitled to $300 worth of credit against these notes, after I had returned the merchandise; I knew that my brother was liable on this note; I spoke to my brother about it; I thought I would wait until the last notes were due and take the $300 then.

The witness thereupon identified the following credit memoranda, and stated that they were the credit memoranda to which he referred:

October 25, 1921	$67.87
October 25, 1921	133.14
October 25, 1921	188.89
November 2, 1921	2.40
November 3, 1921	109.74

Those memoranda represent merchandise returned; the additional $600 worth of merchandise that I bought from the Alpher, Kur, Greenberg Company might have been bought on the very same day I returned the other stuff or it might be the day before—not the whole $600; I used to buy merchandise, whatever I needed and did not have in stock and had to go and get it; I bought merchandise right along through October or to the end of September and the beginning of November; I do not know about December; I do not remember whether I bought quite a lot of stuff between October 1 and October 28; I bought $600 at one time during that period; I bought on October 6, 25, 23, 27 and 28, and that amounted to about $600; that was about the time I returned this merchandise.

On further direct examination the witness testified in substance as follows:

I had to buy additional stock after I had opened up the original stock that had been out there, because I did not get the stock that I needed; I did not have any credit or money to make pur-
33 chases anywhere else; the jewelry in the two boxes we had down here yesterday is my jewelry; I got it from Alpher, Kur, Greenberg Company at the beginning of September; that is the first goods that I bought from them; that was part of a bill of $2,900; I paid $1,000 in cash, and the balance in notes, endorsed by my brother-in-law.

The defendant offered and there was received in evidence the jewelry previously identified, to which the plaintiff objected upon the ground that the evidence was immaterial. But the Court overruled the objection, to which action of the Court the plaintiff, by its counsel, duly excepted.

And thereupon, further to maintain the issues on his part joined, the defendant called as a witness Aaron D. Kronstadt, who, on direct examination testified in substance as follows:

My business is that of a jeweler. I have been in the wholesale and retail jewelry business since 1907; I have been in the wholesale jewelry business since 1908. As to the retail business sometimes I fixed up a little store and sometimes I gave it up. I don't do any wholesale at the present or for the last three years; my business at present is, and for the last three years has been retail jewelry at 1024 Seventh Street, Northwest. A year ago I was familiar with the wholesale value of jewelry in the City of Washington.

On cross-examination the witness testified in substance as follows:

I buy my merchandise from manufacturers in New York. I have not bought from any jobbers. I am a jobber myself. I sell retail, but I buy directly from the manufacturer. I do not ordinarily sell to other dealers. I pay some attention to wholesale. I used to do about $100,000 a year in 1910, 1911 and 1915. In 1921 my wholesale business was about a couple of thousand a year. I did not then do any buying from jobbers at all; Alpher, Kur, Greenberg Company is a jobber. I know as much about the price of merchandise as I knew in 1914 and 1915; I know the value of jewelry I take in my hand. I do know the factory price and so on, it has changed something like 10% either higher or lower. Manufacturers and jobbers have different prices. One jobber may charge 50¢, and another jobber may charge $2.00, and another jobber may charge 90¢, and one may charge only 10¢. Everyone has
34 got a different price, and also the different manufacturers have different prices, no two of them alike. When the war was going on prices fluctuated sometimes thirty and thirty-five per

cent, but since 1919, after the war to 1921 it is only about ten per cent, but it was formerly lower and anyone could charge any price they wanted to. I was familiar with retail prices charged for jewelry in Washington a year ago.

Thereupon the witness was asked the following question on behalf of the defendant:

I will ask you to take those articles one by one, as Mr. Holober did, and give your estimate of the highest possible jobber's price on each piece.

To the foregoing question the plaintiff, by its counsel, then and there duly objected, upon the ground that it was immaterial, but the objection was overruled by the Court, to which action of the Court, the plaintiff, by its counsel, then and there duly noted an exception.

Some of the merchandise is gold plated and some is solid gold; I could not say whether it is gold or plated, but only I can say the value if it is solid gold; if it is gold plated or brass I don't know. I can not tell gold from gold plated by looking at it; they look alike. I could test it and tell, but some have a plated effect which I could not tell from the other except by rubbing it on the stone; the only thing I can tell is by filing it, and see what it is; generally jobbers take the manufacturers word, because we do thousand of dollars worth of business with the manufacturers, and we always find that they are the right articles presented; only one out of ten thousand may represent gold which is not.

The witness thereupon over the objection and exception of the plaintiff testified in respect of certain of the merchandise previously offered in evidence, and charged at $98.74, that it was worth a total of $69.50, after adjusting for those items of which more than one was sold.

Thereupon the plaintiff, by its counsel, moved to strike out all of the testimony of this witness, upon the ground that it was immaterial, but the motion was denied.

On recross-examination the witness testified in substance as follows:

I know Mr. Holober since last December. He does not buy goods from me. Jobbing is just a side line with me; I do not maintain a plant just for the purpose of jobbing. There is no extra overhead on account of my jobbing business; I do not buy from jobbers; manufacturers generally come to Washington, and I go to New York, and I look them over, and I tell them I am not in the market to buy now, but I follow the manufacturers' prices right along. There is considerable variation in the quality of goods from different manufacturers, and they charge different prices; I am acquainted with all of those prices; I used to buy from all manufacturers. Every jobber has a different price; some make 1%, some $\frac{1}{3}$, and some 100%. I charge a profit of 25 to 30%. That is the right price to charge. To describe an article as gold plate is no evidence of the thickness of the plate, and consequently if you look at an article that is gold plated to determine the thickness of the plate of the gold, you could not tell whether it was 10, 20 or 30. A chain which one manufacturer would sell at $2.75 or $2.50 some would sell at $3.25 and another at $2.00 and some may be $1.00, and some even as low as 10¢ and some as low as $2.00 a dozen. I find a variation in the manufacturers price in an article like a chain from 10¢ up to $2.50. If the jobber has to pay more he has to charge more; I can not tell by looking at a pair of cuff buttons how much gold there is in them, but the highest price charged for gold plated buttons is $12.00 per dozen. You can buy solid gold buttons for $20 or $25 a dozen. If I were shown a gold plated ring, I could not tell the fineness of the gold; when I buy my stock I rely a good deal on my general sort of knowledge about the thing, rather than specific information about the particular article. A thing like a chain might be anything from solid gold all the way down to a very thin plating. He never said anything to me about the stuff being misrepreesnted.

I did not know that his purpose in summoning me down here
36 was to have me put low valuations on these things. I was
sitting in Court all morning. I listened to what was going on. I did not know that one of the issues in the case was *a* to whether the price was too high or not; I did not pay any attention. I did not know I was Mr. Holober's witness. I heard that Mr. Holober was claiming that he had been overcharged.

On further direct examination the witness testified in substance as follows:

I got back from New York this morning at four o'clock. I did not have any consultation with Mr. Thomas other than a very few minutes conversation since I got back. I did not know what Mr. Thomas put me on the stand for at all.

And thereupon further to maintain the issues on his part joined the defendant called as a witness HENRY HOLOBER, who, on direct examination testified in substance as follows:

I am the defendant in this cause. I personally have not made any payment on account of those notes. It was the early part of September, I think it was this time in the year about, I received a telephone message one day in my store and Mr. Kur was on the wire. He says, "Mr. Holober, can we see you for a few minutes," he says, "Are you busy?" I says, "No, you can come right up." He says, "Can we see you?" I says, "Certainly."

He came over to the store and my brother-in-law was with him, I. Holober, and my brother-in-law introduced me to Mr. Kur and told me what he came up there for. He says, "Mr. Holober, your brother-in-law has been down to my store. He was down there yesterday to buy some jewelry and I understand he is opening up a jewelry store and we have sold him some jewelry. He wanted about $1,500 worth of jewelry yesterday." I says, "Yes, I know something about it. I think I have been in touch with my brother-in-law about that, but I had been advising him to go to New York because I thought New York is the better market. In fact, I didn't know there was any wholesale man in town here." He says, "I am in the wholesale business and my business is to set up a man in business." He says, "I have all the responsibilities, I have the experience in the trade." He says, "I have confidence in everything that I can sell him to set him up, and it is my interest to see that he gets along in business and makes a living out of it."

And I says, "Well, $1,500.00 is pretty good. I understand
37 that he has a thousand dollars that I know of in cash." He
says, "Since he was there yesterday I selected the goods for him and picked them out, and I picked out about the amount of goods he needs, and it amounted to about $2,900." He says, "That is what I come to see you for."

So I says, "Well, I didn't think he was justified in taking that much goods. He is a new man in business; he has got a pretty big family," and I didn't see how he was going to pay that much. He says, "Well, I know conditions in this town," he said, "I know the jewelry business from A to Z." He says, "Leave it entirely to me and I will thresh it out for him," and he says, "Leave it to me."

I says, "Mr. Kur—" I had known them in the jewelry business for some time, but I have done upholstery work for Mr. Alpher and I know the family, and they are very honorable, and they have treated me right, and I supposed I had a good friend in Mr. Kur.

So he patted me on the back and he says, "Mr. Holober, that is the way I want you to feel. I want you to feel that I have got confidence in you, because your brother-in-law has got a family to keep up and I will see he is treated right."

So I thought that Mr. Kur knew the conditions, and he says, "I will look out for him and see you get the right stock," and I told him I would sign those notes.

I have a cousin in New York in the same business as myself, in the jewelry business, and I thought he could go there and they would look out for him. He saved this thousand dollars, and I didn't want to see him lose it.

That is what was said. After he went out I signed the notes, and gave them to him.

Mr. Kur said the stock was up in his store packed up and ready; he had already $1,000 in cash, and it was up to me to sign those notes before he got the goods. I depended upon his honesty to treat him right, but if I had known he charged 300% on his merchandise, I would not have signed it. There was no consideration other than the promises and representations of Mr. Kur ever given for the signing of the notes.

On cross-examination the witness testified in substance as follows:

I think now my brother-in-law has been cheated. I saw
38 the merchandise afterwards. I have got common sense. I
have never been in the jewelry business, but I have been around in the store. I investigated the goods about two months afterwards; I was born in England. I have been in this country eighteen years; I went to school in England. I have been in business for myself as an upholsterer since 1910. I did not know at that time that if I gave a note for merchandise, and the merchandise is not as represented I did not have to pay the note if I am sued for

it. I signed the notes afterwards I knew that my brother-in-law had been cheated. I told him why don't you go down and see about it if you have been cheated. He said "I have been down there already." He felt that they would do right by him. He said he would recover enough to take care of those things and finally they would make it up. I said something to Mr. Kur about these goods being misrepresented before the suit was filed. I talked to Mr. Stein, and I said I feel you have not treated me right. Mr. Stein said Mr. Kur will be over to see you or talk with you on the telephone. I did not say anything about goods being plated which should have been solid gold. When I signed the notes that was the first time I saw Mr. Kur; I saw him afterwards in my store; I talked to Mr. Kur before the goods were packed. Mr. Kur said "I have selected $2,900 worth of goods because $1,500 is not sufficient. I have picked him out a stock of $2,900 worth, and the goods is packed up, if you sign those notes." That was in my place of business. I saw Mr. Kur before my brother-in-law filed his petition in bankruptcy, and asked Mr. Kur would he please come to see me in the store. He came up about an hour or so afterwards, and he asked me what was the matter. I told him my brother-in-law was doing very bad, and the goods that he got from him is not sold; I asked him to take the goods back, but he would not do it.

And thereupon, further to maintain the issues on his part joined, the plaintiff called as a witness ALBERT SIGMUND, who, on direct examination testified in substance as follows:

I am manager of R. Harris & Co., Washington, D. C., jewelers, and have been in the jewelry business for thirty-five years. I have a general idea of gold plate and solid gold, but not with gold
39 filled or gold shelled. I should not imagine that it is possible to determine the value of a gold plated article without taking a cross section of it to determine how much gold is in it; gold filled is artifically colored; it is hard to determine which is gold filled and which is gold plated by looking at it; I do not think the value of gold-filled articles can be determined by a visual inspection because you do not know how much gold may be in it. We buy primarily from manufacturers, and the jobber must add a profit to it; I do not know what profit the jobber charges.

The witness thereupon testified as to the manufacturers' price of certain of the merchandise previously identified and offered in evidence.

I know Mr. Kur and I knew Mr. Alpher during his life time. We have had business dealings with them for a good many years. We have never had any cause to complain that we were not treated by them.

On cross-examination the witness testified in substance as follows:

I have often talked to men who knew Mr. Alpher and Mr. Kur and they have spoken of them in the highest terms. I have never bought any goods from Alpher, Kur, Greenberg Company and let Mr. Kur pick the goods without my examining them.

On redirect examination the witness testified in substance as follows:

The price of an article depends on the manufacturer from whom you buy it; it may vary twenty-five to thirty-five per cent in the course of a day.

On re-cross-examination the witness testified in substance as follows:

A Jobber must have a fair profit to come out all right selling small quantities and carrying an enormous stock. A little retailer must be entitled to about 50% gross profit.

And thereupon, further to maintain the issues on his part joined, the plaintiff called as a witness Charles Schwartz, who, on direct examination testified in substance as follows:

I am a jeweler in Washington, D. C., and have been in the jewelry business for thirty-four years; I think I am familiar with the values of jewelry made of gold and gold plate; You can not exactly tell by looking at rolled gold or flat gold what the thickness of the gold is, it depends on the various factories. You can not tell the thickness of gold plating by looking at it; I deal with the Alpher, Kur, Greenberg Company, and have dealt with them for about twelve years. I think I know other people who know them; so far as I know they are thought in the trade generally to be absolutely honorable; the trade thinks very highly of them; I should judge I buy between twelve and fifteen hundred dollars worth from them a month; I would not buy goods from them if I did not consider them as reasonable as other jobbers; to my knowledge the prices marked on the tags on the stuff that I found in the Alpher, Kur, Greenberg Company were not higher than the prices charged for similiar articles by other jobbers; I know the mark of the Alpher, Kur, Greenberg Company and the prices are charged to me according to the way they are marked.

The witness thereupon testified as to the jobbers' price of certain of the merchandise previously identified and offered in evidence.

On cross-examination the witness testified in substance as follows: I would not consider that electro gold plated articles are sometimes marked gold filled on the card.

And thereupon, further to maintain the issues on its part joined, the plaintiff called as a witness Nathaniel Goldberg, who, on direct examination testified in substance as follows:

I am shipping clerk and salesman, and have charge of the silver and clocks for the Alpher, Kur, Greenberg Company, and was so employed in September, 1921; I know Mr. Isidore Holober, and I remember him buying merchandise from the Alpher, Kur, Greenberg Company; he saw all the merchandise; I was making up some of the merchandise in person; the salesmen were Mr. Kur, and Mr.

Gregory, but I stayed overtime to help them along; Mr. Holober picked out most of the stuff himself item for item; the testimony of Mr. Holober that it was packed and shipped to him without him knowing it is absolutely untrue; if there was a few items added to it it was done to the best of our knowledge, but he absolutely did pick out almost every bit of it personally.

On cross-examination the witness testified in substance as follows:

The first time Hr. Holober dealt with us was September 10, 1921, and he has been dealing with us ever since.

On redirect examination the witness testified in substance as follows:

The last time Mr. Holober was in our store was a few weeks ago; he wanted watch parts.

41 And thereupon, further to maintain the issues on his part joined, the plaintiff called as a witness JOHN J. GREGORY, who, on direct examination testified in substance as follows:

I am salesman for Worthington & Ramsay, New York; I have been employed by them for five weeks, and before that time I was employed by Alpher & Kur for three years; I was in their employ in September, 1921; I know Mr. I. Holober; I called on him to sell him a bill of goods, and we arranged with Mr. Kur to show him the stock, and he went over our stock and picked the stuff out himself; Mr. Kur and I waited on him; practically all of the goods were personally inspected by Mr. Holober before they were delivered to him with the exception of clocks, silverware and a few boxes and cases.

On cross-examination the witness testified in substance as follows:

I first met Mr. Holober in his store in September, 1921; I solicited his business; I did not say anything to him except that we were a wholesale house here in town, and were soliciting his business; I told him we could take care of him as well as anybody in the country; I said we were carrying a certain line and prices were right; he came down to our store several days later and asked for me; I told him to come in and look our stock over; the following week he came in and picked the goods; we advised him to buy as small as possible and told him he could stock his store with twelve or fifteen hundred dollars' worth as needed; he picked his goods; he stayed real late, eight or nine o'clock; after he got through picking he had $1,000 worth of merchandise picked out; he went around to the sample table and we allowed him to pick anything he wanted, and we laid it aside; he was in and out of the place practically the whole week; the whole stock came to about $3,000.

And thereupon, further to maintain the issues on his part joined, the plaintiff called as a witness WILLIAM D. BAKER, who, on direct examination testified in substance as follows:

I am bookkeeper and small stockholder in Alpher, Kur, Greenberg Company; I was in its employ in September, 1921; I know Mr.

Holober; I saw him pick out goods in the store; he was taking sample trays and picking out item for item; I do not know of any complaints that the shipment was short; Mr. Holober brought back some goods at one time, for which he took an equal amount in other goods; when a man returned merchandise during a month he was given a credit memorandum; all the purchases are listed under one column and the credits under another column, at the end of the month
42 the balances are brought down and the credit substituted
and the balance on the statement carried to the ledger; the amount on the ledger account would be the difference between the purchases of the month and the returns of the month; that is why the credits would not show on the ledger.

On cross-examination the witness testified in substance as follows: I do not know anything about what arrangements Mr. Holober may have made with Mr. Stein about the return of those goods;

And thereupon, further to maintain the issues on its part joined, the plaintiff called as a witness HERMAN KUR, who, on direct examination testified in substance as follows:

I am connected with the firm of Alpher, Kur, Greenberg Company, jewelry jobbers; I know Mr. Holober; I first saw him when he was going to open a jewelry store and wanted to buy merchandise; I told him he was under no obligations to buy merchandise if he thinks he can buy it cheaper; he says he is a jeweler and also a watch maker; I told him to buy what he needed, not too much because he don't know what the place is going to be, and if later he wants to restock he can always come along and get more, and that a five-minutes telephone call will bring a line of merchandise which will meet his needs. I showed Mr. Holober the goods one by one; he wanted to pick too many rings, and I told him so; after looking over a list of the goods he had picked I said "Your bill is more than you expected to buy;" I told him the variety should not be so much at the beginning; I gave him some special prices and a discount of one hundred eighty some odd dollars; after the goods were shipped he said "I wish you would come around and check the goods up," which I did; I was present when Mr. Holober picked the goods; the majority of the goods he picked himself; I did not ship him any goods except the goods which he said he wanted; I did not add anything else to what Mr. Holober said he wanted; I tried to take off merchandise; to my knowledge Mr. Holober never complained of any shortage; I exchanged some of the merchandise for other merchandise; I never got any merchandise as a credit against any of these notes; he never asked me to; when I buy merchandise it is marked by the manufacturer; I take the manufacturer's word for it; I have dealt with the biggest concerns in the United States; my experience shows me that in buying gold from reputable concerns it is what they say it is; the gross profit on merchandise gold filled is sometimes 50%, sometimes
33 and sometimes 25; it all depends on how the article looks;
43 sometimes it is 20%; the jewelry which has been brought

into court is worth the price that we charged for it at that time; the market has fluctuated since then; it took Mr. Holober two or three days to pick out his stock; I can not recollect that he ever complained of a shortage. I came down and helped him check up the goods.

And thereupon the plaintiff rested.

The foregoing is the substance of all the testimony in the case.

And next thereupon the plaintiff requested the Court to instruct the jury as follows:

"The jury are instructed that their verdict should be for the plaintiff for the amount sued for, less the price of goods charged for and not delivered, if any, and less also the price of such goods, if any, as were returned by I. Holober to the plaintiff and agreed by the plaintiff to be credited on the notes in suit."

The Court modified this instruction by adding at the end thereof the following words:

"Provided the jury believe from the evidence that no fraud was perpetrated by the plaintiff in the transaction."

The plaintiff objected to the foregoing modification, but the objection was overruled, to which action of the Court the plaintiff then and there duly noted an exception.

And next thereupon the plaintiff requested the Court to instruct the jury as follows:

"You are instructed, even though you believe from the evidence that the prices charged by the plaintiff for the merchandise sold to the defendant were higher than those at which I. Holober might have purchased like goods from other concerns, that is not a defense."

The Court modified this instruction by striking out the words "in whole or in part," and adding at the end thereof the following:

"Unless other elements are present which amount to fraud."

The plaintiff objected to the foregoing modification, but the objection was overruled, to which action of the Court the plaintiff then and there duly noted an exception.

44 And next thereupon the Court charged the jury as follows:

"Gentlemen of the jury, there are before you for determination two suits based upon promissory notes endorsed by the defendant. The defense is fraud and misrepresentation made by the manager of plaintiff.

"Even if you believe from the evidence that the prices charged by plaintiff were higher than those at which I. Holober might have purchased like goods elsewhere, that is not a defense unlses you find other elements were present which amounted to fraud.

"To find that misrepresentations of material facts were made by plaintiff to defendant, you must find that plaintiff knew the representations were false, and made with intent to defraud and were believed by defendant to his damage, and these facts you must find from a preponderance of the evidence, which does not mean the number of witnesses each has produced, but the weight to be given to the testimony and evidence of each witness.

"The burden of proof is upon the defendant to prove by a preponderance of the evidence the facts upon which he relies for his defense, namely fraud.

"And even if you find that the defendant has not borne this burden respecting fraud your verdict should be for the plaintiff for the amount sued for less the price of any goods you find were charged for and not delivered, and also less the price of any goods returned by I. Holober and agreed by plaintiff to be credited on the notes in suit.

"Gentlemen, you have sat here two days and are the sole judges of the facts submitted, and you may now retire and deliberate and bring in your verdict."

Thereupon the jury retired and thereafter returned a verdict for the defendant.

Be it further remembered that the objections and exceptions made and taken in the course of the trial of the cause were made and taken when and as they purport in the foregoing bill of exceptions to have been made and taken; and the plaintiff prays the Court to sign and seal this, the plaintiff's bill of exceptions, and the same is accordingly done, now for then this 8th day of February in the year one thousand nine hundred and twenty-three.

MARY O'TOOLE, [SEAL.]
Justice.

Endorsed on cover: District of Columbia Municipal Court. No. 3977. Alpher, Kur, Greenberg Co., a corporation, plaintiff in error, vs. Henry Holober. Court of Appeals, District of Columbia. Filed Apr. 5, 1923. Henry W. Hodges, clerk.

C 16.0
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31.00

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

January ~~OCTOBER~~ TERM, 192~~3~~4.

No. 3978.

ALPHER, KUR, GREENBERG COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

HENRY HOLOBER.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 5, 1923.

PRINTED JULY 24, 1923.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1923.

No. 3978.

ALPHER, KUR, GREENBERG COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

vs.

HENRY HOLOBER, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1923.

Court of Appeals of the District of Columbia.

No. 3978.

ALPHER, KUR, GREENBERG CO., a Corporation, Plaintiff in Error,

vs.

HENRY HOLOBER.

1 Municipal Court of the District of Columbia.

At Law.

Number 79164.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

2 *Declaration.*

Filed April 28, 1922.

In the Municipal Court of the District of Columbia.

At Law.

No. 79164.

ALPHER, KUR, GREENBERG COMPANY, a Corporation, Plaintiff,

vs.

HENRY HOLOBER, Defendant.

1. The plaintiff, Alpher, Kur, Greenberg Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, sues the defendant, Henry Holober, for that heretofore, to wit, on the 10th day of September, 1921, one I. Holober, by his promissory note, now overdue, promised to pay to the order of the plaintiff three hundred fifty-five and 58/100 dollars, ($355.58), on February 25, 1922, with interest, and the defendant, who was then and there trading as United Upholstery Company, before delivery thereof, endorsed said note by signing upon the back thereof

"United Upholstery Company.
Henry Holober,"

and said note was thereafter, for value, delivered to the plaintiff, which is now the holder and owner thereof; said note was duly presented for payment and was dishonored, whereof said defendant had notice, but the said defendant did not, nor did the maker of said note, pay any portion of the principal or interest of said note.

Wherefore, the plaintiff brings this suit, and claims of the said defendant the sum of three hundred fifty-five and 58/100 dollars, ($355.58), with interest from the 10th day of September,
3 1921, besides costs.

2. And the said plaintiff further sues the said defendant for goods sold and delivered by the plaintiff to the defendant; and for work done and material provided by the plaintiff for the defendant at his request; and for money loaned by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiffs on accounts stated between them. And the plaintiff claims of the said defendant the further sum of three hundred fifty-five and 58/100 dollars, ($355.58), with interest from the 10th day of September, 1921, according to the particulars of demand hereto annexed, besides costs.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

4 *Bill of Particulars.*

Filed April 28, 1922.

*   *   *   *   *   *   *

$355.58.   Washington, D. C., September 10, 1921.

February 25, 1922, after date I promise to pay to the order of Alpher, Kur, Greenberg Co. Three Hundred, Fifty-five and 58/100 Dollars at 911 9th St., N. W., Washington, D. C., value received, with interest at — per cent per annum until paid.

(Signed)   HOLOBER JEWELRY SHOP,
By I. HOLOBER.

Due 2/27/22.
Endorsement: United Upholstery Co. Henry Holober.
Revenue stamps: 8¢.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

5 *Assignment of Errors.*

Filed April 2, 1923.

*   *   *   *   *   *   *

The Court erred in admitting evidence of alleged overcharge of I. Holober by the plaintiff, as set out in the bill of exceptions.

2. The Court erred in modifying the plaintiff's first prayer for instructions to the jury, as set out in the bill of exceptions.

3. The Court erred in modifying the plaintiff's second prayer for instructions to the jury, as set out in the bill of exceptions.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

6 *Designation of Record.*

Filed April 2, 1923.

*   *   *   *   *   *   *

The Clerk of the Court will kindly prepare transcript of record on appeal in the above entitled cause, and will include therein the following:

1. Declaration.
2. Bill of Particulars.
3. Affidavit of defense. (Same as that in record for A-610.)
4. Stipulation. (Same as that in record for A-610.)
5. Verdict and judgment. (Same as that in record for A-610.)
6. Plaintiff's prayers for instructions to the jury. (Same as that in record for A-610.)
7. Memorandum of Court denying motion for new trial. (Same as that in record for A-610.)

8. Memoranda as to extensions of time for submitting bill of exceptions and for filing transcript of record on appeal. (Same as that in record for A-610.)
9. Assignment of errors.
10. This designation.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

NOTE.—Items numbers 3 to 8, inclusive, not to be copied, having been included in the record for A-610.

7 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause, At Law, No. 79,164, wherein Alpher, Kur, Greenberg Company, A Corporation, is plaintiff, and Henry Holober is defendant, as the same *that* remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this fifth day of April, 1923.

[Seal of the Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk,
By H. M. HULL,
Ass't Clerk.

8-27 Filed Dec. 18, 1922. Municipal Court, District of Columbia.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Mary O'Toole, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Alpher, Kur, Greenberg Company, a corporation, plaintiff, and Henry Holober, defendant, No. 79,164, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 16th day of December, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by
CHAS. H. ROBB,
Associate Justice of the Court of
Appeals of the District of Columbia.

[Endorsed:] Filed Dec. 18, 1922. Municipal Court, District of Columbia.

28 In the Court of Appeals of the District of Columbia.

Nos. 3977, 3978.

ALPHER, KUR, GREENBERG CO., Appellant,

vs.

HENRY HOLOBER.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, That the bills of exceptions in each of said causes are identical, and that said bill of exceptions in No. 3978 need not be printed in the record, but that the bill of exceptions in No. 3977 shall be deemed and considered to be a part of the record in No. 3978.

In witness whereof, the parties to said causes, by their respective attorneys, have hereunto set their hands the 16 day of July, 1923.

ALPHER, KUR, GREENBERG COMPANY,
Appellant,
By SIMON, KOENIGSBERGER & YOUNG,
Attorneys.

HENRY HOLOBER,
Appellee,
By W. BISSELL THOMAS,
Attorney.

[Endorsed:] 3977, 3978. Alpher, Kur, Greenberg Co. vs. Henry Holober. Stipulation as to Printing Record. Court of Appeals, District of Columbia. Filed Jul. 16, 1923. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia Municipal Court. No. 3978. Alpher, Kur, Greenberg Co., a corporation, plaintiff in error, vs. Henry Holober. Court of Appeals, District of Columbia. Filed Apr. 5, 1923. Henry W. Hodges, clerk.

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